



Bonds and Custody

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September 24 – October 11, 2019
Office of the Chief Immigration Judge



ICE Detention Authority: The Big Picture





ICE Detention Authority

- A number of statutory provisions give ICE the authority to detain aliens.
- In some circumstances, detained aliens have a right to a bond hearing before an Immigration Judge.



Port of Entry/Expedited Removal





INA § 235 – Detention of Arriving Aliens and Aliens Subject to Expedited Removal

- An applicant for admission (“arriving alien”) who an immigration officer has determined is not “clearly and beyond a doubt” entitled to be admitted “shall be detained” for a proceeding under INA § 240 (removal proceeding).
 - INA § 235(b)(2)(A)



INA § 235 – Detention of Arriving Aliens and Aliens Subject to Expedited Removal

- Aliens subject to expedited removal “shall be detained” pending a credible fear determination, and if no credible fear, until removed.
 - INA § 235(b)(1)(B)(iii)(IV)
- Aliens subject to expedited removal include those encountered anywhere within the United States and who have not established continuous physical presence for the 2-year period immediately prior to the inadmissibility determination.
 - 8 C.F.R. § 235.3(b)(1)
- Aliens who establish 2 years of continuous physical presence “shall be detained” for INA § 240 proceedings.
 - *Id.*; INA § 235(b)(2)



Parole

- Parole may be available through DHS for arriving aliens and aliens subject to expedited removal.
- Certain arriving aliens may be paroled into the United States for “urgent humanitarian reasons,” or for “significant public benefit,” provided the alien presents neither a security risk nor a risk of flight.
 - INA § 212(d)(5); 8 C.F.R. § 212.5(b)
- Parole of aliens subject to expedited removal is only permitted as a matter of discretion when it is required to meet a medical emergency, or it is necessary for a legitimate law enforcement objective.
 - 8 C.F.R. § 235.3(b)(2)(iii)



INA § 235(b)(1) – Aliens Subject to Expedited Removal But Found to Have a “Credible Fear”

- In 2005, the BIA found that aliens subject to expedited removal but subsequently placed in §240 proceedings after being found to have a credible fear of persecution or torture may seek a custody redetermination by the IJ. *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005).
- In April 2019, the Attorney General issued *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), vacated *Matter of X-K-*, and held that an alien transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture is ineligible for release under bond.
 - The Attorney General delayed the effective date of the decision until July 15, 2019.



INA § 235(b)(1) – Aliens Subject to Expedited Removal But Found to Have a “Credible Fear”

- However, in *Padilla v. ICE, et al.*, No. 18-cv-00928-MJP (W.D. Wa. 2018), the District Court declared that INA 235(b)(1)(B)(ii) is unconstitutional and issued a nationwide preliminary injunction and ordered various procedural requirements for bond hearings.
 - The Ninth Circuit stayed the portion of preliminary injunction related to the procedural requirements.
 - Although *Matter of X-K-* has been expressly overruled by *Matter of M-S-*, *Padilla* class members are still entitled to request custody redetermination hearings.



INA § 236 – Pre-Final Order Detention

- INA § 236 governs detention during removal proceedings, before a removal order becomes final.
- The bulk of an IJ's bond decisions will involve detention under INA § 236(a) and INA § 236(c).



INA § 236(a) and (c)

- “On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”
 - § 236(a) – Discretionary Detention
 - Provides authority for an alien to continue to be detained, released on a “bond of at least \$1,500,” or released on “conditional parole.” Requires a consideration of whether an alien presents a danger to persons or property, is a threat to national security, and/or poses a risk of flight. *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999)
 - § 236(c) - Mandatory Detention
 - Provides for mandatory detention of certain classes of criminal aliens. See also *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).



INA § 241 – Post-Final Order Detention

- Creates a 90-day removal period during which an alien shall be removed from the United States.
- The removal period begins with the LATEST of the following:
 - The date the order of removal becomes administratively final;
 - If a petition for review (PFR) and a stay is issued, the date of the circuit court's final order; or
 - If the alien is detained or confined (except under immigration process), the date the alien is released from detention or confinement.
- Detention during the removal period is mandatory. (But see case law developments in your circuit and others in this area.)
- Post-removal period detention/release provided for in 8 C.F.R. § 241.



Bond Hearing Basics

- The bond hearing is separate and apart from, and shall form no part of, the removal proceedings. 8 C.F.R. § 1003.19(d).
 - Practices vary, and eROP is underway. DAR recordings must be separate.
- The purpose of bond is to ensure that the alien will return to court if released from detention (and that a dangerous or potentially dangerous alien is not released).
- Immigration bonds must typically be paid in full.



Bond Hearing Basics

- If the alien fails to appear following release on bond, the bond is forfeited and the Immigration Judge orders the alien removed *in absentia*.
- There is no statute of limitations for DHS/ICE to take an alien into immigration custody following the alien's release from criminal detention.
 - See *Sylvain v. Att'y Gen.*, 714 F.3d 150 (3d Cir. 2013).



Bond Hearing Basics

- A bond hearing will usually be held in the location where the alien is detained. 8 C.F.R. § 1003.19(c).
- No NTA need be filed for a bond hearing to be requested and conducted. *Matter of Sanchez*, 20 I&N Dec. 223 (BIA 1990).
- A bond hearing may be held in one location, such as where the alien is detained, even though there is a pending removal proceeding in another Immigration Court.



Initial Bond

- DHS (ERO) makes the initial custody determination on Form I-286, Notice of Custody Determination.
 - 8 C.F.R. § 1236.1(d)(1); 8 C.F.R. § 1003.19
- DHS determines whether the alien is:
 - Detained in custody,
 - Released on bond,
 - Released with electronic monitoring, or
 - Released on own recognizance.



How Do Bond Hearings Get on the Court's Docket?

- Alien requests redetermination (noted on Form I-286) or through other request (oral or written).
- Alien's attorney files written request for redetermination, sometimes before an NTA is filed with the court.
- After an initial bond redetermination, subsequent requests must be made in writing and show that the alien's circumstances have changed materially since the prior bond hearing. 8 C.F.R. § 1003.19(e)

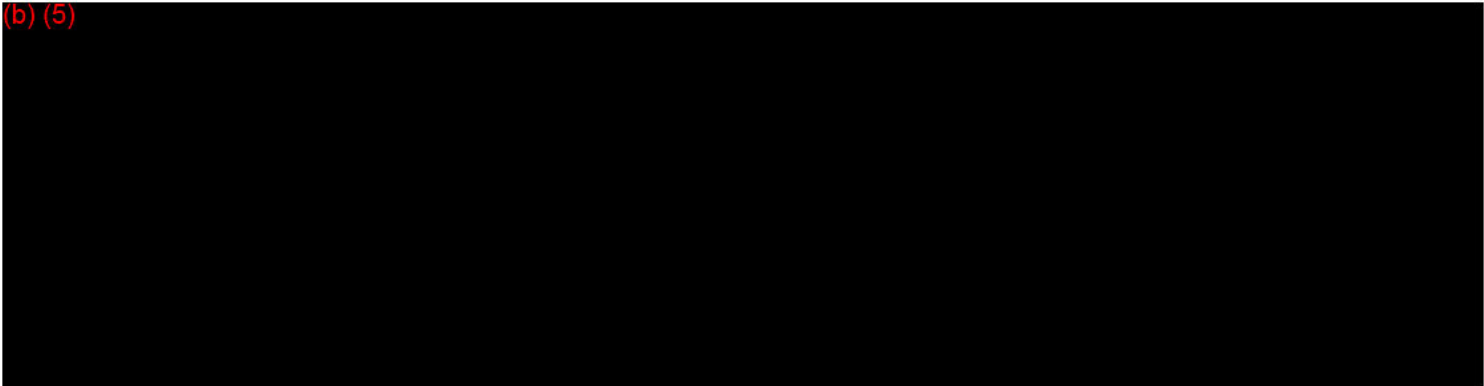


Docketing Practices

- Some IJs hear bond hearings on specialized bond-only dockets, while many IJs handle bond hearings during the same master calendar sessions as the removal proceeding.
- You will need to decide whether to go on the record in the bond hearing first or in the removal proceedings.
- Practices vary widely, and you may want to try different approaches to determine what works best and is most efficient for you.



Recording Bond Hearings

- (b) (5)
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- Certain bond proceedings must be recorded in accordance with federal circuit law.
 - *Franco-Gonzalez, et al., v. Holder*, 828 F. Supp 2d 1133, 1147 (C.D. Cal 2011)



What Happens at a Bond Hearing?

- Alien and DHS present evidence and argument.
- IJ must be prepared to identify any jurisdictional issues:
 - Mandatory custody (INA §§ 235(b), 236(c))
 - Final order of removal (INA § 241(a))
 - Arriving alien



What Happens at a Bond Hearing?

- If no jurisdictional issues, then IJ must determine whether to detain the alien as a matter of discretion under INA § 236(a), considering dangerousness and flight risk, or whether to set bond at a particular level.
- Court provides brief oral basis for the decision and completes and signs the bond order. (A bond memo, of any, will be prepared later, following the filing of a notice to appeal.)



Does the Court Have Jurisdiction to Redetermine Custody?

- An alien detained by the DHS may file a motion for a bond redetermination at any time before an order of removal becomes final. 8 C.F.R. § 1236.1(d)(1)
- Immigration Judge's bond authority begins once DHS has taken the respondent into custody and made an initial bond determination.
 - *Matter of Sanchez*, 20 I&N Dec. 223 (BIA 1990); 8 C.F.R. § 1236.1(a); 8 C.F.R. § 1003.14(a)



Does the Court Have Jurisdiction to Redetermine Custody?

- Immigration Judge's bond authority generally ends with the issuance of a final administrative order of removal. 8 C.F.R. § 1236.1(d)
- A final administrative order or final determination is defined as a "decision from which no appeal or writ of error can be taken."
 - *Padash v. INS*, 358 F.3d 1161, 1170 (9th Cir. 2004) (quoting Black's Law Dictionary 696 (6th ed. 1990))
- Under INA § 101(a)(47)(B), a removal order becomes final upon the earlier of (i) a determination by the BIA affirming the order; or (ii) the expiration of the period for appeal.



Does the Court Have Jurisdiction to Redetermine Custody?

- The Immigration Court continues to have bond authority even if the removal proceedings are terminated if DHS takes an appeal because the respondent remains a subject of the removal proceedings.
 - *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997)
- If the respondent accepts a removal order or a VD order and waives appeal, the court no longer has jurisdiction to set bond.
- The court does not have jurisdiction to redetermine an alien's custody where the respondent is subject to mandatory detention.
 - INA § 236(c)(1); 8 C.F.R. § 1003.19(h)(2)(i)(D)
- The court does not have jurisdiction to set a bond for an arriving alien.
 - *Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998)



Does the Court Have Jurisdiction to Redetermine Custody?

- Other “no jurisdiction” situations:
 - Alien is not in ICE custody.
 - Alien is in Asylum Only proceedings.
 - Alien is admitted pursuant to the Visa Waiver Program and has not been served with a Notice to Appear.
 - Aliens that have been arrested pursuant to a prior removal order that has been reinstated by DHS.
 - Aliens detained under INA § 235(b).
 - Alien makes no request (IJ’s own motion).
 - See *Matter of P-C-M-*, 20 I&N Dec. 432 (BIA 1991)



Mandatory Detention Under INA § 236(c)

The Attorney General shall take into custody any alien who is:

- (A) Inadmissible by reason of having committed any offense under INA § 212(a)(2) (criminal grounds).
- (B) Deportable by reason of having committed any offense under INA:
 - § 237(a)(2)(A)(ii) (multiple CIMTs)
 - § 237(a)(2)(A)(iii) (aggravated felonies)
 - § 237(a)(2)(B) (drug offenses)
 - § 237(a)(2)(C) (firearms offenses)
 - § 237(a)(2)(D) (misc. crimes)



Mandatory Detention Under INA § 236(c)

- (C) Deportable by reason of having committed any offense under INA § 237(a)(2)(A)(i) (one CIMT within 5 years of admission) and sentenced to greater than 1 year.
- (D) Inadmissible under INA § 212(a)(3)(B) (engaging in terrorist activities or removable under INA § 237(a)(4)(B) (presents a national security threat and/or engaging in terrorist activities)).



Mandatory Detention Under INA § 236(c)

- Alien must have been “released” from non-DHS custody on or after the expiration of the Transition Period Custody Rules on October 9, 1998. *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).
 - 8 C.F.R. § 1003.19(h)(1)-(2); see also TPCR
- Even if an alien is released before 1998, an alien can only be detained if the alien is arrested and convicted of an offense that would trigger mandatory detention under INA § 236(c). *Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010)
- “Release” from criminal custody must be for an offense enumerated in the mandatory custody provisions of INA § 236(c)(1)(A)-(D). *Id.*
- “Custody” is satisfied merely by the initial arrest for booking/processing.



Mandatory Detention Under INA § 236(c)

- ICE need not take alien into custody immediately upon “release” from criminal custody. *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001).
- The Supreme Court has held that aliens are subject to INA § 236(c)’s mandatory detention provisions even if there is a gap in time between their release from criminal custody and their immigration detention.
 - *Nielsen v. Preap*, 139 S. Ct. 954 (2019)



Mandatory Detention Under INA § 236(c)

- Alien need not be charged with the ground of removability making section 236(c) applicable. *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007)
- A conviction record is not necessarily required. 8 C.F.R. § 1003.41
- Although DHS may believe that an alien is removable under one of the mandatory detention grounds, neither the IJ nor the BIA is bound by this determination. The IJ has authority to determine the court's jurisdiction and, if warranted, to redetermine the custody conditions imposed on the alien.
 - *Matter of Joseph I*, 22 I&N Dec. 660 (BIA 1999), clarified in *Matter of Joseph II*, 22 I&N Dec 799 (BIA 1999).



Mandatory Detention & *Matter of Joseph*

- Immigration Judges have jurisdiction to determine whether an alien is subject to mandatory detention. INA § 236(c)(1); 8 C.F.R. § 1003.19(h)(2)(ii); see also *Matter of Joseph II*, 22 I&N Dec 799 (BIA 1999).
 - Proceedings in which the alien challenges whether he or she is subject to mandatory detention are sometimes called *Joseph* hearings, but do not actually require a separate hearing.
- Under *Joseph*, the alien bears the burden to establish that he or she is not “properly included” in a mandatory detention category under INA § 236(c)(1)(A)-(C) by showing that it is “substantially unlikely” that DHS will prevail on the removal charge that establishes an offense under INA § 236(c)(1).
 - *Matter of Joseph II*, 22 I&N Dec. at 806-08.



Mandatory Detention & *Matter of Joseph*

- Where the potential removal charge argued to subject an alien to mandatory detention has not in fact been charged, the IJ must examine whether the evidence submitted demonstrates that the alien committed an offense covered under the mandatory detention provisions.
 - *See Matter of Kotliar*, 24 I&N Dec. 124, 126 (BIA 2007).



Arriving Aliens & *Matter of Joseph*

- Arriving aliens and aliens in exclusion proceedings are not entitled to a *Matter of Joseph* hearing or assessment by the Immigration Judge as to whether the DHS has correctly determined that an alien is an arriving alien.
 - See *Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998).



236(a) - the Crux of Most Bond Hearings





Section 236(a) of the Act

(a) Arrest, detention, and release

On a warrant issued by the Secretary of Homeland Security, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Secretary of Homeland Security or the Attorney General--

(1) may continue to detain the arrested alien; and

(2) may release the alien on--

(A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Secretary of Homeland Security or the Attorney General; or

(B) conditional parole



8 C.F.R. § 1236.1(d)(1)

- Under 8 C.F.R. § 1236.1(d)(1), the Immigration Judge has the authority to:
 - detain the alien in custody,
 - determine the amount of bond, if any, under which the respondent may be released.
- Note that the regulations do not reference a minimum bond amount



INA § 236(a) Burden of Proof

- Generally, the *alien* bears the burden of demonstrating that the alien:
 - (1) is not a danger to the community; and
 - (2) is not a flight risk.
 - 8 C.F.R. § 1236.1(c)(8); *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009).
- The burden of proof shifts to the DHS in special types of bond hearings (e.g., *Franco*).



Discretionary Detention

- In determining an alien's custody status or bond, the court will consider:
 - any information that is available to the court on the record; or
 - any evidence presented to the court by the alien or by the DHS.
- 8 C.F.R. § 1003.19(d); see also *Matter of Guerra*, 24 I&N Dec. at 40-41 ("Any evidence in the record that is probative and specific can be considered.")



Discretionary Detention

- All evidence submitted during bond hearings is separate and apart from any evidence submitted in the removal proceeding. 8 C.F.R. § 1003.19(d).
 - There is no “commingling” of evidence – records of proceeding (ROP) remain separate even if the documents are contained in the same file. Court practices vary, and eROP is evolving.
 - The court may consider evidence filed in bond proceedings in the merits proceedings only if it is re-submitted by the parties and received by the court in the removal record.



Factors Considered by the Court

Matter of Guerra, 24 I&N Dec. 37, 40 (BIA 2006):

- (1) Whether the alien has a fixed address in the United States;
- (2) The alien's length of residence in the United States;
- (3) The alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future;
- (4) The alien's employment history;
- (5) The alien's record of appearance in court;
- (6) The alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses;
- (7) The alien's history of immigration violations;
- (8) Any attempts by the alien to flee prosecution or otherwise escape from authorities;
and
- (9) The alien's manner of entry to the United States.



Broad Discretion

- An Immigration Judge has broad discretion in making custody redeterminations, and the Immigration Judge may choose to give greater weight to one factor over others, as long as the decision is reasonable.
 - *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).



Dangerousness

- Aliens not subject to mandatory custody must demonstrate that the alien is not a danger to persons or property.
 - *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).
- The IJ may consider any direct or circumstantial evidence of dangerousness, including whether the facts or circumstances present national security considerations.
 - *Matter of Fatahi*, 26 I&N Dec. 791, 794 (BIA 2016).
- The IJ may consider uncharged conduct, as well as arrests that did not lead to convictions. The IJ is not limited to considering only documents that comprise the record of conviction for purposes of determining removability.



Dangerousness

- Only once an alien establishes that the alien would not pose a danger to property or persons is it proper for an Immigration Judge to consider setting a bond.
 - See *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009).
 - If an alien is a potential danger to the community, then no bond should be set. *Id.*
- Driving under the influence is a significant adverse consideration in determining in bond proceedings whether an alien is a danger to the community.
 - *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018).



Flight Risk

- Much evidence and assessment under INA § 236(a) concerns risk of flight. Amount of bond may sometimes be thought of as the amount needed to ensure, in the context of a given case, that the alien will appear for future immigration court proceedings.
- The Ninth Circuit has held that the IJ must consider ability to post bond as well as alternative conditions of release in setting a bond amount and making custody determinations.
 - *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017)



Handling the Hearing: Allowing Testimony vs. Relying on Statements and/or Proffers

- You will need to consider when and to what extent to allow testimony, as bond hearings are typically interspersed through a busy master calendar docket.
- (b) (5) [REDACTED]



Examples of Evidence Presented by DHS at Bond Hearings:

- Arrest and Conviction Records, including indictment, complaint, and Pre-sentence Investigation Reports
- Identification Documents or Fraudulent Documents Used
- Sworn Statements and Records of Deportable/Inadmissible Alien (Form I-213)
- Witnesses
- Record of Appearance in Court - Failures to Appear, Bench Warrants, Bail Jumping, etc.
- Special Interest or Operation Cases
- History of immigration violations and manner of entry



Examples of Evidence Typically Presented by the Alien

- Availability and strength of relief from removal
- Proof of residence: length, fixed nature, stable, and safety
- Family and community ties
- Good moral character
- Employment and financial ties
- Rehabilitation following any criminal activity
- Membership in churches and other community organizations
- Letters of support from friends and family



Bond Decisions

- Possible bond decisions:
 - Custody status remains the same (request denied)
 - Bond reduced to a particular amount
 - Bond increased to a particular amount
 - Bond revoked
 - Other conditions imposed
 - “No action”



Bond Decisions

- The Immigration Judge must:
 - (1) enter the custody or bond determination on the appropriate form at the time the decision is made; and
 - (2) inform the parties orally or in writing of the basis for the bond decision.
- 8 C.F.R. § 1003.19(f)



Bond Redetermination Following an Initial Bond Hearing

- Following an initial bond hearing, an IJ may reconsider a bond redetermination if:
 - (1) the request is made in writing; and
 - (2) the alien has shown the alien's circumstances have changed materially since the prior bond redetermination.
 - 8 C.F.R. § 1003.19(e).
- An Immigration Judge, however, may not *sua sponte* redetermine bond status.
 - *Matter of P-C-M-*, 20 I&N Dec. 432 (BIA 1991).



Bond Appeals

- Bond determinations made by an Immigration Judge may be appealed by either party to the Board of Immigration Appeals (BIA) within 30 days of the Immigration Judge's order. 8 C.F.R. §§ 1003.38; 1236.1(d)(3).
 - Remember to advise the alien of the right to appeal the bond determination and ensure that pro se respondents are provided with the appeal packet.
 - There is no fee required for a bond appeal. 8 C.F.R. § 1003.8(a)(2)(i)



Bond Appeals

- Immigration Judges are required to write a bond memorandum only if requested specifically by the BIA on an appeal. As a practical matter, the request may come many weeks after the bond hearing.
 - *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999)
- A bond memo should include:
 - the procedural history of the case;
 - a brief summary of the evidence considered by the court; and
 - legal analysis.



Electronic Monitoring and Alternatives to Detention (ATD or ISAP)





Electronic Monitoring and Alternatives to Detention (ATD or ISAP)

- An alien who has been released from detention by the DHS with conditions requiring an electronic monitoring device and home confinement, has been “released from custody” within the meaning of 8 C.F.R. § 1236.1(d)(1).
 - *Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009).



Amelioration of the Terms of Release

- If an alien files an application with the Immigration Judge to ameliorate the terms of release within 7 days of the alien's release from custody by the DHS, the Immigration Judge has jurisdiction to review and modify the conditions placed on the respondent's release. 8 C.F.R. § 1236.1(d)(1);
 - *Matter of Garcia-Garcia*, 25 I&N Dec. 93 (BIA 2009).
- These requests often involve DHS decisions to place an alien on an ankle bracelet monitor, but may involve other conditions placed on the alien's release like reporting requirements.



When May ICE Revoke a Bond That Was Determined By ICE or Redetermined By the IJ?

- At any time if there has been a change of circumstances. 8 C.F.R. § 1236.1(c)(9).
 - Typical circumstances include an alien's arrest on criminal charges or suspicion of gang involvement.
- Alien has the right to seek review of the redetermination before the Immigration Judge.



Prolonged Detention

- A detainee may file a writ of *habeas corpus* in federal district court to challenge the legality of detention without bond during the pendency of removal proceedings.

- (b) (5) [REDACTED]



Special Concerns: Mental Competency

- *Franco-Gonzalez v. Holder*, No. 10–02211, 2013 U.S. Dist. LEXIS 186258 (C.D.Cal. Apr. 23, 2013) (Mentally Incompetent): Ninth Circuit held that a class of mentally incompetent non-citizens who are detained under INA §§ 235(b), 236, and 241 are entitled to bond hearings after six months of detention. DHS must prove “by clear and convincing evidence” that an alien is a flight risk or a danger to the community to justify denial of bond.



Special Concerns: Juveniles

- *Flores* Hearings (Juveniles): On July 5, 2017, the Ninth Circuit issued a decision affirming the Central District of California's Order that the Government was in breach of the *Flores* Settlement Agreement. *Flores v. Sessions*, No. 17-55208, 2017 WL 2855813 (9th Cir. July 5, 2017); Order re Pls' Mot. to Enforce, *Flores v. Sessions*, 2:85-cv-04544 (C.D. Cal. Jan. 20, 2017).
- As a result, EOIR must make bond hearings available, nationwide, to
 - (1) children in the custody of ORR at a staff-secure or secure facility; and
 - (2) pursuant to discussions with counsel, any other child in ORR custody who affirmatively requests a bond hearing with ORR or before the immigration court.



Questions?